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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of SCOTT B. and KAY
SUNDARAM GREENFIELD.

SCOTT B. GREENFIELD,

Respondent,

v.

KAY SUNDARAM GREENFIELD,

Appellant.

D074468

(Super. Ct. No. DN175684)

APPEAL from a judgment of the Superior Court of San Diego County, Gerald C.
Jessop, Judge. Affirmed.

Judith Klein for Appellant.

Griffith, Young & Lass, John N. Griffith and Shane C. Brengle for Respondent.

INTRODUCTION

In this action to dissolve her marriage to Scott¹ Greenfield, Kay Greenfield appeals a judgment of the family court awarding sole legal custody of the couple's child to Scott. Kay contends the trial court improperly made a finding of domestic violence and then applied the presumption of Family Code² section 3044³ that an award of joint custody to a person who has perpetrated domestic violence is detrimental to the best interests of the child. We conclude that the trial court did not abuse its discretion in awarding sole legal custody to Scott and thus affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Scott and Kay were married in April 2008. They have one child, C.G., born in May 2010. The marriage was tumultuous with two incidents of note.

In March 2013, Kay threw a glass at Scott during an argument. The glass struck Scott on the leg, causing bruising and a cut. Kay denied the incident occurred, but the court found Kay failed to provide any evidence to rebut this allegation and that it was domestic violence. Scott presented pictures and medical records from a medical visit shortly after the event as evidence.

¹ Parties are referred to by their first name throughout for ease of understanding.

² Further statutory references are to the Family Code unless otherwise specified.

³ The Legislature amended section 3044 effective January 1, 2019. (See Stats. 2018, ch. 941 (Assem. Bill No. 2044), § 3, eff. Jan. 1, 2019.) This amendment does not affect our analysis in this case. We apply section 3044 as it existed at the time of the trial in May 2018.

In September 2013, Kay tried to take C.G. from Scott's arms, leaving a bruise on Scott. Again, pictures were presented to corroborate this testimony. Kay also denied this incident occurred but presented no evidence to support her position. Based on the evidence before it, the court found Kay committed domestic violence.

At trial, Kay objected to the introduction of the pictures of both incidents because the date displayed in the picture's properties and the date the picture was created were different than the date Scott testified that the incidents occurred. Kay also objected to the pictures because there was no indication the pictures had been authenticated. The objections were overruled.

In addition to the two incidents of Kay's domestic violence, Scott admitted to punching a hole in the wall sometime around 2011-2012 during an argument with Kay. The court found that this incident did not constitute domestic violence.

In July 2013, Scott filed a petition for dissolution of marriage citing irreconcilable differences. Kay filed for a temporary restraining order against Scott. The restraining order was granted with a custody provision providing Kay sole custody of C.G. and Scott having visitation rights. In October 2013, the restraining order was dismissed by stipulation and a custody agreement was reached with primary custody granted to Kay and Scott having visitation rights. In April 2014, another temporary custody hearing was held, and Kay was awarded primary physical custody of C.G., with Scott having visitation rights.

The court ordered that Scott, Kay, and C.G. see an Evidence Code section 730 child custody evaluator, Dr. Steven Sparta. Dr. Sparta recommended that sole legal

custody would not be the most beneficial to C.G. He stated Kay had strong parenting skills and was very capable and involved in C.G.'s caretaking. If Kay were awarded sole legal custody, there was a risk she would not easily coordinate with Scott. However, giving Scott sole legal custody without the benefit of Kay's input would not be in C.G.'s best interests. Dr. Sparta concluded the least detrimental alternative was joint legal custody with restrictions on changes in place.

The court noted section 3044, subdivision (e) prohibited it from basing its order solely on the conclusion of the child custody evaluator; thus, the court had to consider any relevant, admissible evidence submitted by the parties.

After a bifurcated trial in May 2018, the court filed a judgment as to custody issues, awarding sole legal custody of C.G. to Scott and joint physical custody with a 2-2-5-5 schedule.⁴ The court awarded sole legal custody to Scott after finding Kay perpetrated domestic violence in March and September 2013 and that she had not rebutted the presumption pursuant to section 3044. The court made the final order pursuant to *Montenegro v. Diaz* (2001) 26 Cal.4th 249 (*Montenegro*).

Kay timely appealed.

DISCUSSION

Child custody orders must be determined in light of the child's best interest.

(§ 3011.) When determining the best interest of the child, relevant factors include the

⁴ A 2-2-5-5 schedule describes custody where each parent has the child for two days during the week, and alternate weekends. In the present case, the schedule consisted of Kay having C.G. Monday and Tuesday, Scott having C.G. Wednesday and Thursday, and each parent alternating weekends starting on Friday.

health, safety, and welfare of the child, any history of abuse by one parent against the child or the other parent, and the nature and amount of contact with the parents. (§ 3011.) Section 3044 provides a rebuttable presumption that it is not in the best interest of the child to award sole or joint custody to the perpetrator of domestic violence. (§ 3044.) "This presumption is mandatory and the trial court has no discretion in deciding whether to apply it." (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 661 (*Celia S.*)). This presumption may be overcome by a preponderance of the evidence showing that it is in the child's best interest for the court to grant joint or sole custody to the offending parent. (§ 3044.) "The legal effect of the presumption is to shift the burden of persuasion on the best interest question to the parent who the court found committed domestic violence. [Citation.]" (*Celia S.*, at p. 662.)

A court has wide discretion to select a parenting plan that best serves the child's health, safety, and welfare. (§§ 3011, 3040, subd. (c); *Montenegro, supra*, 26 Cal.4th at p. 255.) "The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. [Citation.] The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) "We draw all reasonable inferences in support of the court's ruling and defer to the court's express or implied findings when supported by substantial evidence." (*J.M. v. G.H.* (2014) 228 Cal.App.4th 925, 935.) "All conflicts in the evidence are drawn in favor of the judgment," and "[w]hen supported by substantial evidence, we must defer to the trial court's findings," including its finding on the credibility of witnesses. (*Niko v. Foreman*

(2006) 144 Cal.App.4th 344, 364-365; *Bush v. Bush* (1947) 81 Cal.App.2d 695, 697 ["In accordance with the time-honored rule that conflicts in the evidence are settled in the trial court we must accept [the petitioner's] version and that of his witnesses as true."].)

In determining whether there is substantial evidence to support the court's domestic violence finding, we review the record in the light most favorable to the court's finding and draw all reasonable inferences from the evidence to support the findings and orders. We do not reweigh the evidence or exercise independent judgment, but merely determine whether there are sufficient facts to support the findings of the court.

(*Kevin R. v. Superior Court* (2010) 191 Cal.App.4th 676, 688-689.) The burden is on the individual seeking review to show that the evidence is insufficient to support the court's findings. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

Here the court was presented with substantial evidence to support its finding of domestic violence. Scott presented testimony and pictures in support of his claim of domestic violence. In response to this testimony Kay simply denied the accusations.

At trial, Scott's attorney asked Kay the following:

"[Scott's attorney]: Did you ever throw a glass at [Scott]?"

"[Kay]: Absolutely not.

"[Scott's attorney]: Did you ever grab [Scott's] arm in September 2013?"

"[Kay]: No."

This testimony was the only evidence given to rebut the claim by Scott of domestic violence by Kay.

In addition, Kay objected to the inclusion of the pictures Scott presented as evidence of his leg injuries and arm bruises because of possible discrepancies in dates and authenticity; however, the court overruled those objections and admitted the evidence. Other than Kay's denials, the record before us does not include any evidence to rebut the allegations of domestic violence. In the end, the court found Scott more persuasive and concluded Kay committed domestic violence. Based on these findings, the court was required to apply the section 3044 presumption that the best interest of the child would not be served by granting custody to the perpetrating parent. (*Celia S.*, *supra*, 3 Cal.App.5th at p. 661.) Based on the record before us, we are satisfied that the court properly exercised its discretion in weighing the evidence presented by both parties and awarding sole legal custody to Scott.

Kay also argues that the court ignored evidence that showed she overcame the section 3044 presumption. In determining whether the presumption has been overcome, a trial court shall consider all of the following relevant factors: (1) whether the perpetrator of domestic violence has shown that giving sole or joint physical custody of the child to the perpetrator is in the best interest of the child, (2) whether the perpetrator has successfully completed a batterer's treatment program, (3) whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling, (4) whether the perpetrator has successfully completed parenting classes, (5) whether the perpetrator is on probation and has complied with the terms and conditions thereof, (6) whether the perpetrator is restrained by a protective order or restraining order and has complied with its terms, and (7) whether the perpetrator has committed any further acts of domestic

violence. (§ 3044, subd. (b).) The court may not use the preference for frequent and continuing contact with both parents as set forth in section 3020, subdivision (b) to rebut the presumption in whole or in part.⁵ (§ 3044, subd. (b)(1).) Further, "the court may not base its findings solely on conclusions reached by a child custody evaluator." (§ 3044, subd. (e).)

Kay's argument that the court ignored evidence rebutting the domestic violence presumption is not persuasive. Kay provided no evidence to support this claim. In fact, she does not cite to the record to offer any evidence to support any of the seven factors. In our independent review of the record, Dr. Sparta's recommendation for joint custody is the only evidence to support Kay's argument. However, the presumption cannot be overcome based on a preference for frequent and continuing contact with both parents (§ 3044, subd. (b)(1)), or solely based on the findings of the evaluator (§ 3044, subd. (e)). Therefore, the only factor relevant here is factor (7): "Whether the perpetrator of domestic violence has committed any further acts of domestic violence." (§ 3044, subd. (b)(7).) On the record before us, Kay presented no evidence in support of this factor to rebut the presumption against granting custody to the perpetrator of domestic violence.

⁵ Section 3020, subdivision (b) provides, "The Legislature finds and declares that it is the public policy of this state to ensure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except when the contact would not be in the best interests of the child, as provided in subdivisions (a) and (c) of this section and Section 3011."

The evidence is sufficient to support the conclusion that Kay did not overcome the presumption. The court reasonably determined that the issues affecting Scott and Kay's relationship would affect their parenting and that C.G's best interests would be served by awarding sole legal custody to Scott. There was no error.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.